IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN
BENCH AT JAIPUR

**ORDER**
IN
**S.B. Civil Second Appeal No.67/1988**

Prabhu Lal S/o Ram Nath (since deceased)
through L.Rs. Kamla Bai & Others
...plaintiff-appellants
**Versus**
Mangi Lal S/o Bhanwar Lal (since deceased)
through L.Rs. Smt. Manni Bai & Others
...defendant-respondents

**Date of Order ::: 02.11.2006**

Present
**Hon'ble Mr. Justice Narendra Kumar Jain**

Shri U.N. Bhandari, Sr. Advocate, with
Shri L.L. Jain, Counsel for plaintiff-appellants
Shri Rajendra Pratap Singh, Counsel for defendant-respondents

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**//Reportable//**

**By the Court**:

Heard learned counsel for both the parties.

The plaintiff-appellant filed a civil suit in the lower court for demolition as well as permanent injunction, which was decreed by the lower court and it was directed that the defendant will remove the log ('lattha') from the ventilator of the house of the plaintiff and further directed the defendants to raise construction in his house in the first floor in such a manner that there may not be any obstruction in the

easementary right of air and light of the plaintiff through windows and ventilator of his house. Being aggrieved with the same, an appeal was preferred by the defendant, which was allowed by the District & Sessions Judge, Jhalawar vide impugned order dated 24th of February, 1988.

While admitting the second appeal, this court formulated the following substantial questions of law for adjudication on 5th of July, 1988:-

> "1. Whether the finding of the first appellate court which reverse the finding of the trial court without basing its conclusions on appraisal of evidence but only on conjectures, surmises and inferences is not liable to be interfered with and quashed?
>
> 2. Whether it is necessary to state substantial damages caused in so many words in the pleadings and the evidence and, failure to do so will dis-entitle the plaintiff to seek relief, specially in a case when there is a pleading to this effect in the amended plaint and issue has been framed thereon and evidence also led to that effect.
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> 3. Whether under the Easement Act, easement of light and air is acquired by the building and for claiming the same regard must be had not

merely to the effect upon a particular room but the whole building?

4. Whether without claiming specific relief of declaration in the prayer clause in the facts and circumstances of this case would dis-entitle the plaintiff to seek permanent injunction, specially when no specific issue to this effect was either framed nor pressed for being framed by the defendant?"

The learned counsel for the appellants contended that the learned lower court, after considering oral and documentary evidence decided all the issues in favour of the plaintiff-appellant but the learned first appellate court, without considering the reasonings given by the lower court as well as evidence adduced by plaintiff and on the basis of surmises and conjectures, reversed the findings of the lower court, particularly in respect of issue no.3. He further contended that in the present case the plaintiff examined five witnesses, namely, Prabhu Lal, Panna Lal, Hukam Chand, Manak Chand and Meri, whereas the defendants examined seven witnesses, namely, Mangi Lal, Prabhu Lal, Nand Lal, Bhairu Lal, Laxmi Narain, Kasam and another Laxmi Narain. Both the parties also produced documentary evidence but the first appellate

court did not consider the statements of plaintiff's as well as defendant's witnesses. He has referred the finding of the first appellate court in respect of issue no.3 and after considering the said finding I find that the learned first appellate court has not referred and considered the plaintiff's as well as defendant's evidence in detail. It was the duty of the first appellate court to refer and consider the oral as well as documentary evidence of both the parties, in detail, and to record its finding on the basis of the evidence available on the record in place of surmises and conjectures. The first appellate court is a fact-finding court, therefore, it is necessary for the first appellate court to refer and consider the entire oral and documentary evidence adduced in the case by both the parties and to record its finding thereafter on the issues framed in the case.

The learned counsel for both the parties agree that the first appellate court has not considered the evidence of both the parties, in detail, as required to be considered by the first appellate court being a fact-finding court, therefore, learned counsel for both the parties contended that the matter may be remanded back to the first appellate court to reconsider the evidence of both the parties and to

record its findings thereafter on the issue formulated in the present case.

Consequently, the question no.1 formulated by this court is decided in the manner that the first appellate court has reversed the findings of the trial court without basing its conclusions on appraisal of evidence but has arrived its own conclusion only on conjectures and surmises.

In view of the above conclusion on question no.1, the case has to be remanded back to the first appellate court to decide the appeal afresh after considering the evidence of both the parties, therefore, it is not necessary to decide the remaining substantial questions of law formulated in the present case.

In the result, the second appeal is allowed and the impugned judgment dated 24.2.1988 passed by the District & Sessions Judge, Jhalawar, in Civil Appeal No.24/84, is set-aside and the case is remanded back to the Court of District & Sessions Judge, Jhalawar, with the direction to consider the oral and documentary evidence led by both the parties afresh and decide the first appeal on merits after hearing both the parties.

There will be no order as to costs.

The registry is directed to send the record of both the courts below to the Court of District & Sessions Judge, Jhalawar.

Both the parties are directed to appear before the District & Sessions Judge, Jhalawar, on 18th of December, 2006. The District & Sessions Judge, Jhalawar, is directed to decide the appeal afresh on merits, as directed above, preferably within a period of four months from the date of receipt of the record.

Both the parties are directed to maintain the status-quo in respect of the property, in dispute, during the pendency of the first appeal before the first appellate court.

**(Narendra Kumar Jain) J.**

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